

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

On appeal appellant contends that OWCP erred in its consideration of his arguments regarding the reduction of his wage-loss compensation.

### **FACTUAL HISTORY**

This case has previously been before the Board. In a decision dated July 11, 2006, the Board reversed OWCP's January 11, 2005 decision<sup>2</sup> which found that appellant's earnings as an insurance investigator fairly and reasonably represented his wage-earning capacity.<sup>3</sup> The Board found that OWCP improperly relied upon the opinion of Dr. Patrick J. Barry as he was not the physician selected to act as an impartial medical specialist. The Board found there was unresolved conflict in medical opinion between Dr. Michael A. Abrahams, an attending Board-certified orthopedic surgeon, and Dr. D. Barry Lotman, a second opinion Board-certified orthopedic surgeon, with regard to appellant's work restrictions and the extent of his remaining residuals. In a second appeal, the Board issued an order dismissing appellant's appeal on July 25, 2007.<sup>4</sup> The Board found it lacked jurisdiction as OWCP had not issued a final adverse decision within a year of appellant's November 26, 2006 appeal. On April 5, 2007 OWCP issued a notice of proposed reduction of wage-earning capacity. The Board issued an order dated January 30, 2008 which dismissed appellant's appeal.<sup>5</sup> The Board found that OWCP had not issued a final decision on the reduction of his wage-loss compensation. In a January 14, 2009 decision, the Board reversed a May 20, 2007 OWCP decision reducing his compensation based upon a constructed loss of wage-earning capacity determination. The facts of the case as set forth in the Board's prior decision are hereby incorporated by reference.

In an April 19, 2010 letter, appellant informed OWCP that he had accepted a position with TLO, LLC on March 15, 2010. He requested that OWCP suspend his wage-loss compensation. Appellant noted that his salary at his new employment was equivalent to the amount he had made as a special agent.

Appellant filed claims for wage-loss compensation (Form CA-7) for the period July 23 to August 27, 2011.

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<sup>2</sup> Docket No. 06-503 (issued July 11, 2006).

<sup>3</sup> On May 14, 2001 appellant, a 40-year-old special agent, filed a traumatic injury claim alleging that on April 27, 2001 he sustained injuries to his right knee, left wrist, right ankle and lower back due to an automobile accident. OWCP accepted the claim for right knee open wound, lumbar sprain/strain, right ankle strain/sprain and left wrist strain/sprain, which was subsequently expanded to include closed fracture of the right metatarsal and right chondromalacia of the patella. It authorized right knee arthroscopic surgery, which was performed on November 12, 2002 and right ankle arthroscopic surgery, which was performed on January 14, 2003. By letter dated January 27, 2003, OWCP placed appellant on the periodic rolls for temporary total disability. On June 4, 2003 appellant had metatarsophalangeal arthroscopy surgery. On March 12, 2012 OWCP accepted the conditions of right hip trochanteric bursitis, left knee chondromalacia, left ankle synovitis, left foot plantar fasciitis and left heel spur as consequential injuries.

<sup>4</sup> Docket No. 07-407 (issued July 25, 2007).

<sup>5</sup> Docket No. 07-1734 (issued January 30, 2008).

By correspondence dated August 16, 2011, appellant requested that his wage-loss compensation under FECA be resumed.

By letter dated September 29, 2011, OWCP informed appellant that the evidence of record was insufficient to establish that his wage loss was due to his accepted employment injury. The evidence of record showed that he had worked for TLO as an attorney since March 16, 2010 with an annual salary of \$104,000.00 and that his annual salary was reduced to \$52,000.00 on July 23, 2011 due to corporate downsizing. OWCP advised appellant as to the evidence required to support his claim for wage-loss compensation and gave him 30 days to provide additional information.

By letter dated October 3, 2011, appellant stated that, while he was an attorney based on his passing the Florida Bar examination, his employment with TLO was not as an attorney.

In an October 6, 2011 report, Dr. Abrahams, a treating Board-certified orthopedic surgeon, diagnosed right hip trochanteric bursitis, lumbar spondylosis, status post right knee arthroscopic surgery, status post right ankle arthroscopic surgery, right great toe joint replacement, left knee chondromalacia patellae, left ankle synovitis and left foot plantar fasciitis/heel spur. He noted that appellant's work restrictions as of July 2011 included no prolonged standing, lifting, squatting, bending and walking and no involvement in meetings or conferences requiring him to stand eight hours per day.

By decision dated November 2, 2011, OWCP found that appellant's actual wages as an attorney for TLO, effective March 15, 2010, with wages of \$2,000.00 per week (\$104,000.00 per annum) represented his wage-earning capacity as he demonstrated an ability to perform the duties of the job for two months or more. The position was found suitable to his partially disabled condition. OWCP noted that appellant's date-of-injury pay rate was \$1,605.89 effective November 11, 2002 and that the current pay rate for his date-of-injury position effective October 28, 2011 was \$1,808.47. It concluded that, as his wages exceeded the wages of the job he held when injured, his entitlement to wage-loss compensation ceased when he was reemployed with no loss in wage-earning capacity.

On November 3, 2012 appellant requested an oral hearing before an OWCP hearing representative, which was held on February 8, 2012. At the hearing appellant testified that his duties for TLO did not include attorney work, but required attending meetings and conferences and reviewing applications. He testified that he currently did not have any duties to perform in his job and that his salary was reduced in July 2011.

By decision dated April 23, 2012, OWCP's hearing representative affirmed the November 2, 2011 decision.

### **LEGAL PRECEDENT -- ISSUE 1**

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.<sup>6</sup> An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.<sup>7</sup> Under section 8115(a) of FECA, wage-earning capacity is determined by the actual wages received by an employee if such earnings fairly and reasonably represent his or her wage-earning capacity.<sup>8</sup> Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, will be accepted as such measure.<sup>9</sup>

When an employee cannot return to the date-of-injury job because of disability due to work-related injury or disease, but does return to alternative employment with an actual wage loss, OWCP must determine whether the earnings in the alternative employment fairly and reasonably represent the employee's wage-earning capacity.<sup>10</sup> The procedure manual notes that reemployment may not be suitable if the job is part time, seasonal or of a temporary nature.<sup>11</sup> After the employee has worked for 60 days, OWCP will determine whether his or her actual earnings represent his or her wage-earning capacity. In so doing, OWCP will apply the *Shadrick* formula in determining the claimant's monetary entitlement.<sup>12</sup>

The Federal (FECA) Procedure Manual provides that OWCP make a retroactive wage-earning capacity determination if an employee has worked in the position for at least 60 days, the position fairly and reasonably represented his wage-earning capacity and the work stoppage did not occur because of any change in the injury-related condition affecting the ability to work.<sup>13</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP did not properly determine appellant's loss of wage-earning capacity based on his actual earnings as an attorney. When OWCP learns that an employee has returned to alternative work more than 60 days after the fact, the claims examiner may consider a

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<sup>6</sup> *H.N.*, Docket No. 09-1628 (issued August 19, 2010); *T.F.*, 58 ECAB 128 (2006); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

<sup>7</sup> 20 C.F.R. §§ 10.402, 10.403.

<sup>8</sup> *M.A.*, 59 ECAB 624 (2008); *Sherman Preston*, 56 ECAB 607 (2005). See 5 U.S.C. § 8115(a).

<sup>9</sup> *S.B.*, 59 ECAB 482 (2008); *Lottie M. Williams*, 56 ECAB 302 (2005).

<sup>10</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (October 2009).

<sup>11</sup> *Id.* See *Connie L. Potratz-Watson*, 56 ECAB 316 (2005).

<sup>12</sup> *Id.* See *Albert C. Shadrick*, 5 ECAB 376 (1953). This has been codified by regulation at 20 C.F.R. § 10.403.

<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(e) (October 2009).

retroactive loss of wage-earning determination. Such a determination is generally to be considered appropriate where an investigation reveals that appellant held private employment and had substantial earnings, which were not reported to OWCP or were otherwise not used in adjusting compensation entitlement.<sup>14</sup>

The November 2, 2011 decision, which an OWCP hearing representative affirmed on April 23, 2012, constitutes a retroactive wage-earning capacity determination. Appellant returned to work on March 15, 2010. He informed OWCP of his employment in an April 19, 2010 letter that on March 15, 2010 he accepted an offer of employment with TLO. OWCP reduced appellant's compensation in its November 2, 2011 decision finding that his actual earnings as an attorney represented his wage-earning capacity as he held the position for more than 60 days. It found that the position was suitable because he had demonstrated his ability to perform the duties for two months or more. OWCP did not address, however, how such employment fairly or reasonably represented his wage-earning capacity, or whether his subsequent work stoppage was due to his injury-related condition, as alleged by appellant and required by its procedures.<sup>15</sup> It did not address appellant's work at TLO as part of its adjudication. In this regard, appellant maintained that he did not work as an attorney, which OWCP determined as fairly and reasonably representing his loss of wage-earning capacity. Moreover, OWCP did not consider Dr. Abrahams' October 6, 2011 report and work restrictions. Dr. Abrahams recommended against appellant attending conferences and meetings involving standing in excess of eight hours, as well as limiting standing, lifting, squatting, bending and walking. Accordingly, the Board finds that it did not fully consider all criteria for making a retroactive wage-earning capacity determination.<sup>16</sup>

### **CONCLUSION**

The Board finds that OWCP improperly reduced appellant's compensation benefits based on his actual earnings as an attorney. OWCP did not follow its procedures in making a retroactive loss of wage-earning capacity decision.

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*; see also *Selden H. Swartz*, 55 ECAB 272 (2004) (OWCP procedures provide that OWCP can make a retroactive wage-earning capacity determination if the claimant worked in the position for at least 60 days, the position fairly and reasonably represented his or her wage-earning capacity and the work stoppage did not occur because of any change in his injury-related condition affecting the ability to work).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 23, 2012 is reversed.<sup>17</sup>

Issued: December 21, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>17</sup> In view of the Board's disposition of the merits, the issue of whether OWCP properly denied his request to reopen his case for further review of the merits under 5 U.S.C. § 8128(a) in its April 30 2012 decision is moot.